IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
MAR 22 1980
MICHAEL RODAK, JR., CLERK

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NO. 79-1486

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TOMMY FRANK HARE,

Petitioner

vs.

STATE OF ALABAMA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * * *

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ATTORNEYS FOR PETITIONER

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NO.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

* * * * * * * * * * *

Petitioner, Tommy Frank Hare, prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Alabama entered October 30, 1979, affirming his conviction of burglary in the second degree as charged in the indictment, and that on hearing the judgment of conviction be reversed.

OPINION BELOW

The opinion of Tommy Frank Hare v. The State of Alabama (App. A., infra, p. 1a) has been reported in 377 So.2d 1143 with certiorari denied by the Supreme Court at 377 So.2d 1148.

JURISDICTION

The defendant was charged with burglary in the second degree and the judgment of the Alabama Court of Criminal Appeals was entered on October 30, 1979. A timely application for rehearing was denied on November 20, 1979, without opinion. A timely petition for writ of Certiorari to the Alabama Supreme Court was denied without opinion on December 21, 1979.

This Court has jurisdiction under 28 U.S.C., Paragraph 1257, subsection (c).

QUESTION PRESENTED

1. Whether a critical portion of the proceedings against the defendant in a state criminal case can be conducted when the record does not reflect that the defendant was present with his counsel and/or either participated in a vital decision relative to the case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States (See Appendix C., infra, p. 1c).

STATEMENT OF THE CASE

The defendant was indicted for the second degree burglary of Medical Plaza Pharmacy, Inc., wherein certain drugs and lawful currency were taken, by the Colbert County, Alabama grand jury.

The petit jury upon a trial of the cause found the appellant guilty of burglary, as charged, and the Alabama trial court set his sentence at ten years imprisonment in the penitentiary.

During the course of the trial against the defendant the rural county petit jury was permitted to separate and return to their individual homes even though this is expressly forbidden by Alabama law unless it is expressly agreed to by the accused and his attorney and no such agreement appears anywhere in the record of the proceedings against the accused.

The conviction of the defendant was appealed to the Court of Criminal Appeals of Alabama where it was affirmed on October 30, 1979. This opinion was reported and has been fully set out in the appendix hereto. In the opinion, the appellate court presumes from a silent record that the accused agreed to the jury separation complained of.

REASONS FOR GRANTING THE WRIT

The laws of the state of Alabama recognize that in order for a defendant to have a fair trial, which is oftentimes held in small rural areas, it is essential that while this trial is going on the petit jurors be kept together and isolated thus judicially from any possible prejudicing factors extant in the area during the trial. This differs from the Federal rules where the jurors have been drawn from a whole segment of a state as opposed to perhaps one small county therein. Thus, the right asserted now by the appellant is Constitutionally necessary in Alabama in order to assure the accused a fair and impartial trial. Like many such rights, however, it may be waived if done so explicitly by both the defendant in personam and his counsel separately from him.

In the instant case, the record of the trial does not reflect anywhere that such specific waivers were given.

The appellate court, recognizing that such a waiver is required by Code of Alabama 1975, § 12-16-9, presumed from a discussion reported on the record between the Court and the attorney for the defendant that such an agreement had been in fact entered into when no such agreement appears anywhere in the record.

Simply stated, appellants reason for asking this court to grant his writ is based upon a contention that the Sixth Amendment to the United States Constitution in combination with fundamental due process, guaranties him not only a right to a speedy trial by jury but a trial in which he is accorded all of those rights which the forum state feels to be necessary thereto. In assessing whether or not this has been done a reviewing court must look back to the entire record. See United States v. Hammonds, 1978, 425 F.2d 597, 138 U.S. App. D.C. 166.

It is the stenographic or mechinical verbatim recording of the required questions and answers which will reflect adequately whether waivers are given voluntarily and knowingly. The procedure of having a verbatim record seems not only to protect the rights of the accused but prevent a reviewing court from having the burden of reconstructing a record, when they can do so, Bramhett v. Peterson, D.C. Fla. 1969, 307 F.Supp. 1311.

A sixth amendment denial or a denial of due process cannot be properly considered by a reviewing court from a silent record. State v. Frederick, 1964, 390 F.2d 281, 74 N.M. 42 and Conway v. State, Tex.Cr.App. 1967, 417 S.W.2d 159.

In other words, there can be no constitutionally proper trial without a complete transcript of all vital proceedings because a failure in this regard denies the accused any meaningful appellate review of his conviction. In the instant case for example, the accused says, in effect, I did not waive my right under Alabama law to a sequestered jury. The appellate court of Alabama says, in effect, the record is silent but "reference" is made by indirection in this regard by others and so your right cannot be vindicated because of a defective record.

The case is not a small one in overall effect. The fundamental question of whether a fully transcribed record of a felony trial is a constitutional necessity to a fair trial must be answered affirmatively at some time by this court or else the right to meaningful appellate review in all states is farcical and unenforceable.

CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Writ has been mailed this date by certified mail to the Honorable Charles A. Graddick, Attorney General, at his office, 250 Administrative Building, Montgomery, Alabama, 36130.

DATED this the 19th day of March, 1980.

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APPENDIX A

Tommy Frank HARE

v.

STATE

8 Div. 200.

Court of Criminal Appeals of Alabama

Oct. 30, 1979.

Rehearing Denied Nov. 20, 1979.

Defendant was convicted in the Circuit Court, Colbert County, Clifford K. Delony, J., of second-degree burglary, and he appealed. The Court of Criminal Appeals, Tyson, J., held that: (1) defendant was precluded from asserting for first time on appeal challenge to alleged separation of jury, and (2) evidence indicating that defendant was acting as lookout established prima facie case of burglary in second degree.

Affirmed.

Writ denied, Ala., 377 So.2d 1148.

1. Criminal Law 1039, 1044.1(1), 1063 (1)
Defendant, who failed to challenge alleged jury separation in trial court by objection, motion for mistrial, or motion for new trial, was precluded from asserting his challenge to the alleged separation on appeal. Cole of Ala.1975, §12-16-9.

2. Burglary 41(1)
Evidence indicating that defendant was acting as lookout while his accomplices entered drugstore from which drugs and pills were taken established prima facie case of burglary in second degree.

J. Louis Wilkinson and Charles M. Purvis, Birmingham, for appellant.

Charles A. Graddick, Atty. Gen., and Willie E. Isaac, Asst. Atty. Gen., for the State, appellee.

TYSON, Judge.

Tommy Frank Hare was indicted for the second degree burglary of Medical Plaza Pharmacy, Inc., wherein certain drugs and lawful currency were taken. The jury found the appellant guilty of burglary in the second degree, as charged, and the trial court set sentence at ten years imprisonment in the penitentiary.

Cameron Guy, Detective Sergeant with the Narcotics Division of the Birmingham Police Department, testified that he was on a special assignment, working with the police in the Muscle Shoals area, on June 2-3, 1978. He stated that he was accompanied by his Birmingham partner, Charlie Trucks; Pat Curry, a female police officer; J. K. Eaton, of the Birmingham Police Department; Jim Reed and Jim Williams of the United States Drug Enforcement Administration.

Guy indicated that the officers went to the office of the Muscle Shoals, Alabama, Police Department and there talked with the Chief and other officers about 2:30 on the afternoon of June 2, 1978. As a result of this conversation, the Muscle Shoals officers, working under the supervision of Lieutenant Robert Hall and Birmingham police officers, staked out the Avalon Plaza Drugstore, located on Avalon Road in Muscle Shoals, Alabama.

Officer Guy stated that the drugstore in question was placed under surveillance about 3:00 in the afternoon, and shortly thereafter the appellant Tommy Frank Hare and two companions, Barry Wade Alford and Robert Daubach, were observed driving in an automobile near the Avalon Plaza Drugstore. Guy observed the appellant and his two companions turn into the parking lot and drive through it. The appellant and his two companions then drove away, headed toward the Wilson Dam

Road. Between 4:30 and 4:45 in the afternoon, Guy observed the three men at the scene of the Avalon Plaza Drugstore, driving a two-tone green 1972 Ford with a vinyl top. Officer Guy and his companion then followed the appellant as he drove over to a K-Mart store, located on Highway 43. Hare and Alford were observed going inside the K-Mart store and then returning with a CB radio, which they installed in the 1972 Ford. This occurred at approximately 5:30 in the afternoon. A few minutes later, the officers were able to pick up the conversation as the appellant and his companions tested the CB. Appellant Hare was observed walking with a "walkie-talkie" in hand and speaking into it. This conversation was picked up on the police radio frequency. The officers stated they remained out of the sight of the appellant and his companions, using binoculars, and heard a voice that was recognized as the appellant's, using the words, "test, test, test, can you hear me - we'll use Channel 15."

The officers then followed the appellant and his two companions as they circled near some apartments parallel to the Avalon Plaza Drugstore and then parked. The officers noticed a Dodge automobile parked next to the Ford in which Hare, Daubach and Alford were riding. Hare and his two companions then drove away in the Ford and did not return again until about 7:45 that evening. At this time Hare was observed driving the Ford into the drugstore parking lot, then driving away a third time.

Hare, Daubach and Alford then returned to the drugstore about 8:35. The officers noted that the drugstore had just been closed for a short time. Daubach was described as wearing a football jersey with No. 32 on the back. Alford was wearing a green pullover sweater, and Hare was wearing a circular striped pullover shirt with jeans.

Alford was observed going inside a convenience store and purchasing some cigarettes and soft drinks. One carload of the officers were no more than fifteen feet from the appellant and his two companions at the time. The three men remained in the parking lot about

ten minutes. Alford and Daubach then started a blue Dodge automobile, and Hare followed in the 1972 Ford. The two automobiles were kept in vision by the officers as they drove back onto Wilson Dam Road where Alford let Daubach get out of the Dodge in a parking lot near some apartments down the street from the drugstore. Officer Guy then proceeded to follow the Ford car with Hare driving, and saw him pull into a lot near some apartments. He heard the appellant's voice speaking on the CB radio, stating, "That's real good brother two, go on about your business, everything is real cool." During this time the drugstore was under the surveillance of the officers, and it was closed for the evening.

Defendant Hare was observed by Guy riding up and down Avalon Road in front of the drugstore for fifteen to twenty minutes.

Shortly after 9:00 o'clock p.m., defendant Hare picked up his companion, Alford, and pulled into the parking lot of the Seven-Seas fish place. A few minutes thereafter Daubach pulled into the lot, driving the blue Dodge. Officer Guy again recognized the appellant's, Hare's, voice as he spoke over the CB radio and said, "Let's make some calls." Then the appellant's voice was heard to say, "Brother one and brother two, in and out, let's go." The appellant was then observed again driving up and down Avalon in front of the drugstore in the 1972 green Ford. A few minutes later, the two automobiles, with Daubach driving the blue Dodge, were observed turning onto Wilson Dam Road toward Highway 157. Appellant Hare was driving the green Ford with Alford riding on the passenger's side. The officers then followed the two vehicles for about ten miles as they headed southeast from Muscle Shoals on Highway 157 at approximately 10:25 that evening. The two vehicles pulled into an Exxon station at the intersection of Highways 101 and 157 where Appellant Hare pulled the Ford over to the gas pump and was observed putting in some gasoline. All three men then got into the Dodge and talked for a few minutes, then Hare returned to the green Ford. The two vehicles continued southeast on 157 toward Molton, Alabama. The officers kept the two vehicles under surveillance for approximately another five to ten miles when they decided to

stop the vehicles at the intersection of the Molton Highway.

Lieutenant Hall and Agent Williams pulled around the vehicles and in front of the appellant and Daubach at the Molton intersection. Officer Guy and his companion pulled immediately behind them and got out. The officers informed the appellant, Alford and Daubach that they were under arrest. On the back seat of the Dodge was a king-sized pillowcase full of drugs and pills. Officer Guy recognized some of these as being Dilaudid, some barbiturates and some amphetamines.

The appellant, Hare, was driving the 1972 Ford, and a Miranda warning was given to him and his two companions.

Guy stated that he spoke to Hare as he knew him and said, "Tommy, you are in a lot of trouble," to which Hare replied, "I don't know about me, but the fellow in front of me there (indicating Daubach) is in a lot of trouble." This statement was made after a proper Miranda warning.

At the time the drugs were secured and taken back to the Muscle Shoals Police Department, where Lieutenant Hall made an inventory of the items. Guy states that these bottles contained the label, Medical Plaza Pharmacy, Muscle Shoals. Guy indicated this store was in Colbert County, Alabama.

Lieutenant Robert Hall of the Muscle Shoals Police Department testified that he first talked with Birmingham Officer Guy and other Birmingham officers and federal agents concerning staking out the Medical Plaza Pharmacy in Muscle Shoals about 2:30 on the afternoon of June 2, 1978. Hall indicated that this pharmacy was located in a residential area near some apartments and two doctors' officers, all of which faced Avalon Road. Lieutenant Hall stated that he drove a police vehicle, unmarked, near the drugstore later that afternoon and observed the appellant and his two companions, Alford and Daubach as they drove around looking at the Medical Plaza Pharmacy. He stated that they were monitoring a CB radio which they saw the men install in the Ford car and followed the appellant's car, a 1972 Ford, and a blue Dodge, driven by Daubach, until about 8:30 or 9:00 that

evening. About this time, Lieutenant Hall was advised that the burglar alarm had gone off at the drugstore and they remained just behind the drugstore in a man's backyard and there observed Daubach come out of the drugstore, walk across a field, and get into a blue Dodge. Hall then followed Daubach to the point where he met Hare at the Seven-Seas' parking lot. Daubach arrived first, and a few moments later Hare drove in at the wheel of the 1972 green Ford. At this point the men talked and then started driving east, then southeast away from the Muscle Shoals area. Daubach was leading in the blue Dodge, and Hare was driving the 1972 Ford just behind. He stated the officers kept both vehicles in their vision after they first stopped at an Exxon service station for gas for the Ford, then continued driving toward Molton and Town Creek where it was decided they would arrest the men.

Lieutenant Hall stated that he drove past the appellant's and Daubach's automobiles, then cut in front of them at the bypass around Molton, Alabama, being the intersection of Highways 157 and 24.

Officer Guy and his companion pulled against the automobile driven by Hare, and all the officers got out and told the appellant and his two companions they were under arrest, then immediately gave them a Miranda card warning. At this time Daubach was driving the blue Dodge and Hare was driving the 1972 green Ford with Alford seated on the passenger's side of the Ford. The men were ordered out of the two vehicles. Lieutenant Hall stated he seized a king-sized pillowcase containing a number of different types of drugs which had the Medical Plaza Pharmacy, Muscle Shoals, label on them.

Lieutenant Hall stated that he took custody of the pillowcase containing the drugs and made an inventory of them upon his return to Police Headquarters at Muscle Shoals. Hall identified State's Exhibit one, the photograph he made of the drugs in the pillowcase. Among these were the following (R. p.66);

> "There was a bottle of Tincturn Opium. We had one bottle of Codeine, a bottle of Dilaudid, Demerol, Eskatrol, another vial of Demerol, Preludin, Seconal, Nembutal, Sopor, another bottle of Dilaudid, some more Codeine and some more Dilaudid, some more Eskatrol."

Lieutenant Hall then identified a "walkie-talkie" radio and a CB radio and antenna which were taken from the 1972 Ford driven by Hare, the appellant.

On cross-examination, Hall stated the CB radio was of the brand name "MacDonald," and that he did not find any drugs on the person of Tommy Hare or in the 1972 Ford driven by Hare.

Clyde Ray, Jr., testified that he was the president of an Alabama corporation known as Medical Plaza Pharmacy in Muscle Shoals, Alabama, on June 2-3, 1978. Mr. Ray stated that he was a pharmacist and had locked the business shortly after 8:00 o'clock on the evening of June 2, 1978. He stated he received a call to go back to the pharmacy late that evening and found the front door was broken open, that the burglar alarm had gone off, and a large supply of drugs and narcotics, including sickroom supplies, had been taken. Ray indicated that some money in the form of United States currency was also taken.

Ray indicated that among the missing drugs were some Dilaudid, some Demerol, and a large quantity of barbiturates and amphetamines. Mr. Ray indicated that Lieutenant Hall of the Muscle Shoals Police Department later returned a number of the missing drugs to him.

Lieutenant Hall was then recalled and stated that he returned all except approximately ten bottles taken from Medical Plaza Pharmacy to Mr. Ray.

The appellant did not testify or present any evidence in his behalf.

Prior to trial, the appellant filed a motion to suppress and a motion to quash, both of which were denied.

The trial court gave an extensive oral charge to which no exception was taken.

I

[1] The appellant first asserts that the jury was allowed to separate, thus requiring a reversal of this cause.

The provisions of §12-16-9, Code of Alabama 1975, permits the trial jury to separate by the consent of the

appellant and his attorney, and also the prosecuting attorney, made in open court with the approval of the trial judge.

Record page 11, in pertinent part, is as follows:

"BY THE COURT: I am excusing the remaining jurors until nine in the morning.

"(At this time the remaining jurors left the courtroom)

"BY THE COURT: We will move along as fast as we can. The jury will be allowed to separate in this case. The defendant agreed, after a discussion outside the presence of this jury, that you will be allowed to separate in this case. Do you want the rule invoked?

"MR. PURVIS: Yes, sir.

"BY THE COURT: I don't know who the witnesses are.

"MR. PATTON: Mr. Hall is a witness.

"BY THE COURT: We will take a five minute recess and you can wait right there or walk in the hall, but in this recess and each and everyone - I don't anticipate anyone trying to say anything to you. If they do, you are under your duty to report it to this Court and I want to protect the right of the jury to separate. Don't talk about the case to anyone or among yourselves, and allow no one to discuss the case or make any comment - even talking to somebody else where you can hear it. Five minute recess, ladies and gentlemen.

"(After a short recess, court proceedings were resumed)

"BY THE COURT: Court will come to order. Is the State ready?

"MR. PATTON: Yes, sir.

"BY THE COURT: Defendant ready?

"MR. PURVIS: Yes, sir."

As may be seen, the appellant and his attorney had agreed in open court to the separation by the trial jury in this cause. Moreover, the trial court, as may be seen, properly instructed the jurors concerning this.

Nowhere in this record did the appellant challenge this alleged separation in the trial court by objection, motion for mistrial, or motion for new trial.

The appellant having failed to assert this matter in the trial court, such may not now be asserted for the first time on appeal. Turner v. State, 54 Ala.App. 467, 309 So.2d 503 (1975); Armstead v. State, 57 Ala.App. 459, 329 So.2d 150 (1976); Cooper v. State, Ala.Cr.App., 340 So.2d 871, cert. denied, Ala., 340 So.2d 872 (1976); Woods v. State, Ala.Cr.App., 346 So.2d 9, cert. denied, Ala., 346 So.2d 10 (1977); Luttrell v. State, Ala.Cr.App., 357 So.2d 1018 (1978).

II

[2] The appellant asserts that the State failed to present a prima facie case of burglary in the second degree.

In Eason v. State, 48 Ala.App. 471, 265 So.2d 913 (1972), we find the following:

"The applicable elements of second degree burglary are: (1) breaking, (2) entering, (3) with intent to steal or to commit a felony. The evidence, without contradiction, shows the first two ingredients. Behel v. State, 40 Ala.App. 689, 122 So.2d 537. From Behel, this Court per Cates, J., stated:

" 'The jury may reasonably infer intent to steal from the mere presence of the accused in the shop in circumstances showing a breaking and entering in the night. 12 C.J.S., Burglary, §55. "

The record in the case at bar clearly established that the appellant and his two companions entered the Medical Plaza Pharmacy on the night of June 2, 1978, and removed a large quantity of narcotic drugs therefrom. The evidence indicates that the appellant was acting as

the lookout by riding up and down Avalon Road while talking with his two companions over the CB radio as they entered the drugstore in question.

Beyond question, the jury could infer the requisite intent to steal under the circumstances established by the evidence in this cause. Eason, supra; Livingston v. State, 44 Ala.App. 559, 216 So.2d 731 (1968); Bates v. State, 52 Ala.App. 257, 291 So.2d 351 (1974); Hare v. State, 52 Ala.App. 279, 291 So.2d 371 (1974); Creel v. State, 53 Ala.App. 504, 301 So.2d 267 (1974);

It is clear that the State properly presented a prima facie case, and the trial judge therefore properly submitted this cause to the jury for their determination.

We have examined all rulings of the trial court and find this record free of error. The judgment is therefore

AFFIRMED.

All the judges concur.

APPENDIX B

Ex parte Tommy Frank HARE.

(Re Tommy Frank Hare

v.

State of Alabama).

79-177.

Supreme Court of Alabama.

Dec. 21, 1979.

Certiorari to the Court of Criminal Appeals, 377 So.2d 1143.

EMBRY, Justice.

Writ Denied.

TORBERT, C.J., and BLOODWORTH, FAULKNER and ALMON, JJ., concur.

APPENDIX C

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.